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NATIONAL DEFENSE UNIVERSITY

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WHO HOLDS THE PURSE STRINGS?

The President's Authority to Spend Money

Without Congressional Authorization

Core Course Three Research Paper

Colonel John Burton

Class of 95

Core Course Three

Dr. McDonald

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WHO HOLDS THE PURSE STRINGS?

Introduction.

Over the past two decades, Congress has frequently challenged foreign policy decisions and other actions of the President by either denying funding for specific purposes or attaching qualifying conditions to specific appropriation bills for Executive branch agencies. Occasionally, Congress has failed to pass an appropriation bill before the previous one expired at the end of the fiscal year. Does Congress have the exclusive "power of the purse" for the federal government? Can Congress negate Presidential decisions or shut down the Executive branch by simply not authorizing appropriations? The answer is no. The President may spend money from the general treasury in certain situations without Congressional authorization. This paper examines the constitutional basis for the President's spending prerogatives and the limitations on both the Congress and the President in exercising their respective spending authorities.

The Constitutional Framework.

During the Revolutionary War, the legislative federal government created by the Articles of Confederation proved to be divisive and incapable of providing the unitary leadership required during a crisis./1 The drafters of the Constitution sought to correct this problem by creating a strong Executive branch to run the federal government and to exercise certain authorities independent of authorization by the Legislative branch./2 In Article II of the Constitution the drafters provided express authorities for the President, several of which are mandatory. Of particular relevance

to this paper are some of the President's authorities in sections 2 and 3: the President shall be the Commander in Chief of the army and navy; he shall have power to grant reprieves and pardons; he shall have the power to make treaties; and he shall "take Care that the Laws be faithfully executed." It is important to note that where the drafters believed any of the President's authorities should be subject to action by Congress, they expressly wrote the restriction into the body of Article II (e. g., appointment of inferior Executive branch officers in section 2).

The drafters left most of the power of the federal government over the states in the Legislative branch. Article I, section 8 lists many affirmative authorities vested in Congress, especially those which the former colonies viewed as the most onerous, such as the power to "lay and collect Taxes." Nowhere in section 8, however, does the Constitution give Congress a general, much less "exclusive", authority to spend money. On the contrary, Article I, section 8 imposes duties on the Congress just as Article II imposes duties on the President, the performance of which requires the expenditure of money from the general treasury. Congress' so-called "power of the purse" is found in Article I, section 9, which lists several express restrictions on Congress' authority under section 8. Specifically, clause 7 of section 9 states that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

Nowhere in the debate over clause 7 did any of the drafters suggest that this restriction on spending money from the treasury was intended to authorize Congress to act in derogation of the

President's Article II authority. Instead, the intent was to ensure that Congress could not itself spend money except through the elaborate scheme laid down elsewhere in the Constitution that requires appropriation bills to originate in the House of Representatives, to be passed by a majority of both houses, and to be signed into law by the President. The purpose of the clause was to ensure accountability for public funds (which had been lacking under the Articles of Confederation) and to place that responsibility primarily in the Congress./3 The debate among the drafters centered on the Senate's role in making federal spending decisions and whether both houses, or just the House of Representatives alone, should be involved in making appropriations. The argument was not over checks and balances between the Executive and Legislative branches./4

It is important to note what clause 7 does not say. It does not say that money may be drawn from the treasury only when authorized by Congress. It simply states that such expenditures must be "made by Law." In this regard, bills passed by Congress and signed by the President are but one source of law. Treaties made by the President with the advice and consent of the Senate are also "the law." The Constitution itself is the supreme law of the United States. Therefore, whenever the President is acting pursuant to one of his mandatory constitutional duties, he may draw money from the treasury for such purpose without authorization by Congress./5

Limits on Congress' Spending Authority to Affect Presidential Action.

There are three ways that Congress has attempted to influence Executive branch actions through its Article I authority to make appropriations by passing laws: Congress fails to appropriate

money for certain activities; Congress specifically denies the use of a specific appropriation (or sometimes any appropriation) for a specific purpose; and Congress appropriates money for a specific purpose but places conditions on how it may be spent. To add "teeth" to its appropriation authority, Congress has enacted the Anti-Deficiency Act to make criminal the actions of any officer or employee of the United States who either spends money from the general treasury for a purpose in excess of the amount appropriated for such purpose or incurs an obligation by the United States for a specific purpose before any appropriation has been made for such purpose./6 Both prohibitions include the all-important caveat -- "unless authorized by law" -- thus preserving the all-important constitutional requirement and implicitly conceding the President's spending authority under Article II. In addition to the two broad prohibitions, there is also a prohibition on accepting voluntary services (e. g., government employee services in the absence of an appropriation for them) "except for emergencies involving the safety of human life or the protection of property."/7

The outer limits of what Congress can and cannot do in exercising its appropriation authority are generally "clear". The Supreme Court has held that Congress cannot use its appropriation authority in Article I to undermine either a restriction on its own authority (e. g., the equal protection clause of the 14th Amendment/8) or the authority conferred upon the Executive and Judicial branches. Congress cannot impose conditions on spending federal money that achieves a result forbidden by the Constitution. Thus, in Bowsher v. Synar, the Supreme Court held that while Congress may pass a

law and appropriate money for its execution, it cannot get involved in the execution of the law because "faithful execution of the law" is an express authority conferred upon the President by Article II, section 3./9 The President's constitutional authority cannot be limited by a conditional appropriation that requires the execution of the law to be satisfactory to Congress. Similarly, when a law passed by Congress vests certain authorities in the Executive branch, execution of the law by the President cannot be subject to "disapproval" by a single House or Congressional committee. This practice of "legislative veto" was held unconstitutional by the Supreme Court in INS v. Chadha, inasmuch as it not only encroached upon the President's Article II powers but also failed to meet the constitutional requirements for passing laws (i. e., action by both Houses and presentment to the President)./10

Limits on the President's Spending Authority without Congressional Approval.

Against the backdrop of the Judicial branch constraints on Congress's spending authority, the President must decide when to confront Congress directly over its spending decisions (or its failure to make a spending decision). The conflict between the President and Congress arises, not surprisingly, when Congress does not give the President what he believes he needs to perform his Article II duties and to operate the Executive branch. Normally, the disagreement affects a small percent of the budget. The President has three choices when Congress passes an appropriation bill: accept the decision of Congress, veto the bill to leverage further political compromise, or allow the bill to become law (because

he signs it or Congress overrides his veto). The last choice poses the real constitutional dilemma. The President is sworn to "preserve, protect, and defend the Constitution of the United States." If he believes that a spending decision by Congress creates an unconstitutional result, he is required by the Constitution to take the necessary action to preclude such a result. Similarly, the President must decide what action is required when Congress has failed to appropriate money for the performance of what he believes are constitutionally-required actions.

When Congress fails to pass any appropriation bill, its inaction threatens to shut down the federal government and jeopardizes the President's ability to execute his oath. Attorneys General of the United States have long held the view that Congress may not thwart what the Constitution requires the President to do./11 In January 1981, Attorney General Benjamin Civiletti issued an opinion on the permissible limits of Presidential spending in the absence of a Congressional appropriation./12 He opined that the President has both statutory and constitutional spending authorities that do not violate the Anti-Deficiency Act. The "unless authorized by law" exception of the Anti-Deficiency Act clearly includes laws passed by Congress, such as laws that authorize continuing activities without an annual appropriation (e. g., 25 U.S.C. 99; 41 U.S.C.11) and that provide multi-year expenditures (certain procurement monies). Additionally, the "protection of human life and property" exception for voluntary services allows continued operation of certain agencies, such as the FBI and Coast Guard. The core of the President's spending authority, however, is Article II. Referring to the President's

power to grant pardons as an example, Civiletti wrote: "Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum obligational authority to carry this power into effect."/13 The Anti-Deficiency Act, he wrote, "should not be read as necessarily precluding exercises of executive power through which the President, acting alone or through subordinates, could have obligated funds in advance of appropriations had the Anti-Deficiency Act not been enacted."/14 Thus, the President may continue spending to carry out his Article II duties, such as necessary national defense missions and foreign affairs activities. (Civiletti did not define, however, what "minimum obligational authority" meant; it is left for the President to decide what must be done to fulfill his constitutional mandate.) For agency activities not covered by express statutory authority or by the President's Article II authority, Civiletti concluded that there was also implied Congressional approval to spend money for "shutdown functions" as an agency terminated its operations.

The President's authority to spend federal money to fulfill Article II duties in the absence of Congressional authorization is not a recently-developed theory to usurp Congress' power. President Washington spent money in excess of that appropriated for the Army and Navy when he put down the Whiskey rebellion (to quell an insurrection)./15 Even then, there were those in Congress who viewed his action as without authority. The most famous example was that of President Lincoln, who turned over two million dollars of federal funds to private citizens at the outbreak of the Civil War to obtain war materiel, and did not report the expenditure

to Congress for over a year./16 In responding to his critics in Congress, President Lincoln succinctly queried: "Is it possible to lose the Nation and yet preserve the Constitution?"/17

Congress has never expressly conceded the President's Article II spending authority in the absence of an appropriation. The view of Congress is best summarized by Professor Kate Stith of Yale Law School: "Congress may itself violate the Constitution by failing to provide funds for Presidential activities independently authorized by the Constitution. A Presidential claim of such violation, however, does not give the President constitutional authority to spend in the absence of appropriations."/18 Curiously enough, this exact issue has not been brought before the Supreme Court. Congress has eventually provided appropriations for the disputed Presidential spending, and in doing so expressly "ratified" the "unauthorized" expenditures by the President. Presidents, on the other hand, have taken great care to ensure that their spending was either supported by the people or not controversial in Congress.

A very different issue arises when Congress does pass an appropriation bill but attempts to limit the President's authority by attaching conditions to the use of the money or specifically denying the use of money for a specific purpose. As discussed above, the Supreme Court has stated the obvious: Congress cannot use an appropriation bill to subvert the Constitution. But as a practical matter, neither the President nor Congress want their policies second-guessed by the Judicial branch. Accordingly, how much Congress can "get away with" in limiting the President's prerogatives under Article II is determined as much by political

compromise between the President and Congress as by the constitutional principles involved. Presidents use two basic tactics: they either sign the bill and state that they do not intend to follow the unconstitutional portion, or they use a veto or threat of veto to force a compromise in Congress. (Agreement between the President and Congress certainly does not obviate any constitutional deficiencies in the law. Presidents signed numerous laws containing "legislative veto" provisions without objection, because it suited them as well as Congress. Yet the Supreme Court voided the procedure when it was challenged by an alien facing deportation.)

The last two Department of Defense (DOD) appropriation acts contain good examples of Congress trying to limit the President's prerogatives through the appropriation process and the give-and-take involved. In signing the FY95 DOD Appropriations Act, President Clinton objected to language purporting to modify an arms control treaty and wrote in his signing statement: "Section 8136, which relates to changes in obligations under the Treaty on Conventional Forces in Europe (CFE Treaty), cannot restrict the constitutional options for congressional approval of substantive modifications of treaties, and I sign this bill with that understanding."/19 Another comprehensive example is section 8151 (the "Byrd Amendment") of the FY94 DOD Appropriations Act, which cut off funds for US military activities in Somalia after 31 March 1994. Recognizing that a blanket cut-off of funds would create a direct conflict with the President's Article II duties, Congress added exceptions to permit reasonable exercises of the President's Article II duties, e. g., the protection US personnel and bases and the provision

of logistical support to United Nations (UN) forces in Somalia. Section 8151 also provided that, in providing the authorized military support to the UN, US forces must remain under the command and control of US commanders. In signing the bill, President Clinton did not object to the funding restriction with its "Article II exceptions", but he did object to the command and control provision: "I construe section 8151(b)(2)(11) as not restricting my constitutional responsibility and authority as Commander in Chief, including my ability to place U.S. combat forces under the temporary tactical control of a foreign commander where to do otherwise would jeopardize the safety of the U.S. combat forces in support of UNOSOM II."/20 Could the President have refused to withdraw US forces from Somalia? Yes, if he believed he was required to do so by Article II to meet the US obligations under the UN Charter (a treaty) or the UN Participation Act (22 U.S.C. 287d-1). If he had done so, Congress could have retaliated by delaying Executive branch appointments and requested legislation. Thus, both the President and Congress melded their authorities in political compromise.

Conclusion.

Congress'"power of the purse" is not exclusive. Presidents have consistently used their Article II spending authority to meet extraordinary challenges as well as the more mundane, but potentially serious, task of keeping the federal government running during periods of Congressional paralysis. Presidents are kept in check, however, by the considerable appropriation authority of Congress over its enumerated Article I, section 8 duties, many of which have considerable political importance to the President.

Notes

- 1/ J. Gregory Sidak, "The President's Power of the Purse," Duke Law Journal 5 (1989): 1166-1173.
- 2/ Sidak 1202-1206.
- 3/ Sidak 1175-1177.
- 4/ Sidak 1172.
- 5/ Sidak 1183-1188.
- 6/ 31 U.S. Code 1341.
- 7/ 31 U.S. Code 1342.
- 8/ U.S. v. Lovett, 328 U. S. 303 (1946).
- 9/ Bowsher v. Synar, 478 U. S. 714 (1986).
- 10/ INS v. Chadha, 462 U. S. 919 (1983).
- 11/ Caleb Cushing, "Contracts for the Extension of the Capitol,"
6 Opinions of the Attorney General (1853): 26.
- 12/ Benjamin Civiletti, "Authority for the Continuance of
Government Functions During a Temporary Lapse in Appropriations,"
5 Opinions of the Office of Legal Counsel (1981): 1.
- 13/ Civiletti 5-6.
- 14/ Civiletti 6.
- 15/ Sidak 1178-1179.
- 16/ Sidak 1189-1192.
- 17/ Sidak 1190.
- 18/ Kate Stith, "Congress' Power of the Purse," 97 Yale Law
Journal (1988): 1343, 1362 (n. 89).
- 19/ William J. Clinton, "Statement on Signing the Department
of Defense Appropriations Act, 1995," 30 Weekly Compilation of

Presidential Documents (1994): 1926.

20/ William J. Clinton, "Statement on Signing the Department of Defense Appropriations Act, 1994," Public Papers of the Presidents (Nov. 11, 1993).